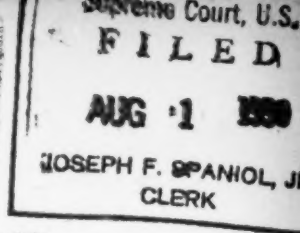


(2)  
90-228

NO. \_\_\_\_\_



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IN THE SUPREME COURT  
OF THE UNITED STATES

October Term, 1990

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COMMONWEALTH OF MASSACHUSETTS,  
Petitioner,

v.

PAUL R. COUTURE,  
Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS

---

APPENDIX

---

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UNITED STATES

1914

of the Department of Agriculture

Washington

July 1, 1914

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 27th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,  
Your obedient servant,

J. H. ...

Special Agent in Charge

U. S. Department of Agriculture  
Washington, D. C.

---

COMMONWEALTH vs. PAUL R. COUTURE.

---

Middlesex.

December 6, 1989 - April 9, 1990.

Present: Liacos, C.J., Abrams, Nolan,  
O'Connor, & Greaney, JJ.

COMPLAINT received and sworn to in  
the Lowell Division of the District  
Court Department on February 12, 1988.

On appeal to the jury session, a  
pretrial motion to suppress evidence was  
heard by Neil J. Colicchio, J.

An application for an interlocutory  
appeal was allowed by Wilkins, J., in  
the Supreme Judicial Court for the  
county of Suffolk and the appeal was  
reported by him.

Cheryl A. Jacques, Assistant  
District Attorney, for the Commonwealth.

P. Scott Bratton for the defendant.

Robert Dowlut of the District Columbia & Karen L. MacNutt, for National Rifle Association of America, amicus curiae, submitted a brief.

LIACOS, C.J. The Commonwealth appeals from a judge's allowance of the defendant's motion to suppress a handgun which was uncovered during a warrantless search of the defendant's motor vehicle. A single justice of this court allowed the Commonwealth's application for interlocutory review and reported the case to the full court. We affirm the ruling of the motion judge.

The facts of the case, as found by the motion judge, are these. On February 11, 1988, a clerk at a convenience store in Lowell telephoned the local police and informed them that a man inside the store had a small handgun protruding from his right rear

pocket. The clerk said that the man entered a gray pickup truck with a New Hampshire registration number. The clerk reported the registration number to the police.

Officer Gary Richardson of the Lowell police department received a national park ranger's radio transmission stating that the ranger was following a truck which matched the clerk's description and which bore the reported registration number. Officer Richardson located and stopped the vehicle. He approached with his service revolver drawn, ordered the defendant, who was alone, out of the vehicle, and took him to the rear of the truck. As his partner detained the defendant, Officer Richardson searched the vehicle and found a small .38 caliber pistol which was three or four inches under the

front seat, near the transmission.

Officer Richardson testified that he was not in fear for his safety at the time of the search. The officer advised the defendant of his rights and asked the defendant if he had a license for the gun. The defendant replied that he did not have a license.

The judge allowed the defendant's motion to suppress the firearm, citing Commonwealth v. Toole, 389 Mass. 159 (1983). We agree with the judge that this case is governed by Commonwealth v. Toole, supra.

In Toole, a State trooper lawfully stopped the defendant's vehicle and arrested the defendant on an outstanding arrest warrant. The police ordered Toole to leave the vehicle, and a subsequent "pat-frisk" revealed an empty holster and an ammunition clip



containing .45 caliber bullets. While Toole waited in handcuffs with two State troopers at the rear of the vehicle, another trooper searched the vehicle and found a .45 caliber gun behind the seat. After the search, Toole admitted that he did not have a firearm identification card. The troopers did not fear for their safety during the search. Toole was charged with unlawfully carrying a firearm under his control in a vehicle. A judge in the Greenfield District Court allowed Toole's motion to suppress evidence of the gun.

We affirmed, stating that probable cause did not exist at the time of the search:<sup>1/</sup>

---

<sup>1/</sup> We also held in Toole that the search in that case could not be justified as a search incident to a lawful arrest. G.L. c. 276, §1 (1988 ed.).

"[I]t has not [been] shown that, when the search was conducted, the police reasonably believed that there was a connection between the vehicle and any criminal activity of the defendant, an essential element to a finding of probable cause. . . . The empty holster and ammunition found on the defendant certainly created probable cause to believe that there was a gun in the cab. But carrying a .45 caliber revolver is not necessarily a crime. A possible crime was carrying a gun without a license to carry firearms, G.L. c. 269, §10(a). However, the police did not learn that the defendant had no firearm identification card until after the search. They apparently never asked the defendant whether he had a license to carry a firearm. [There was an] absence of any showing that, before searching the vehicle, the police had probable cause to believe that there was contraband, an illegally carried weapon, in the cab. . . ." (Citation and footnote omitted; emphasis supplied.)

Commonwealth v. Toole, supra  
at 163-164.2/

In the case at hand, the judge's findings and the record make clear that the police had no probable cause to believe that the defendant was or had been engaged in any criminal activity. There is no evidence to suggest, and the Commonwealth does not claim, that the defendant was acting suspiciously when he was seen by the clerk at the convenience store. There is no indication that the gun which was seen was used in any manner to threaten or

---

2/ We reaffirmed Toole's holding in Commonwealth v. Nowells, 390 Mass. 621, 627 (1983), when we stated: "The ownership or possession of a handgun (or a rifle) is not a crime and standing alone creates no probable cause." We noted in Commonwealth v. Rojas, 403 Mass. 483, 485 n.3 (1988), citing Nowells, that "possession of a handgun is not per se illegal."

intimidate the store clerk. There is no suggestion that the defendant lingered for an unusual period of time at the store or that he was "casing the joint" in preparation for a robbery. See Terry v. Ohio, 392 U.S. 1, 6 (1968). Rather, the police only knew that a man had been seen in public with a handgun. Under Toole, this unadorned fact, without any additional information suggesting criminal activity, does not give rise to probable cause. The police in this case had no reason to believe, before conducting the search of the vehicle, that the defendant had no license to carry a firearm. A police officer's knowledge that an individual is carrying a handgun, in and of itself, does not furnish probable cause to believe that the individual is illegally carrying that gun.

The Commonwealth argues that this conclusion conflicts with a body of law relating to G.L. c. 269, §10(a) (1988 ed.), the statute criminalizing the unlawful carrying of a firearm. We disagree. General Laws c. 269, §10(a), provides for the punishment of an individual who, "except as provided by law, carries on his person, or carries on his person under his control in a vehicle, a firearm, loaded or unloaded." The statute lists four exceptions to this general rule, two of which include "having in effect a license to carry firearms" issued under G.L. c. 140, §131 or §131F (1988 ed.).

In Commonwealth v. Jones, 372 Mass. 403 (1977), we discussed the elements required to prove a violation of G.L. c. 269, §10(a). In that case, the Commonwealth presented no evidence to

show that the defendant did not have a license to carry a firearm, and the defendant argued that there was error in the denial of his motion for a directed verdict and in the jury instructions on licensing. We affirmed the conviction for unlawfully carrying a firearm.

We stated in Jones, supra at 406:

"The holding of a valid license brings the defendant within an exception to the general prohibition against carrying a firearm, and is an affirmative defense. . . . Absence of a license is not 'an element of the crime,' as that phrase is commonly used. In the absence of evidence with respect to a license, no issue is presented with respect to licensing. In other words, the burden is on the defendant to come forward with evidence of the defense. If such evidence is presented, however, the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense does not exist." (Citation

omitted.)<sup>3/</sup>

The Commonwealth argues that Jones and Toole, read together, lead to an "irrational" result, namely, that a police officer in the street must show more in determining that a gun is unlawfully carried than a prosecutor needs to prove to obtain a conviction. This argument is based on a superficial reading of the standard set forth in the Jones case. Jones dealt with the allocation of burdens in the context of

---

3/ Previously in the Jones opinion, supra at 405, we discussed the history and purpose of G.L. c. 278, §7 (1988 ed.), which provides in part: "A license . . . shall prove the same; and, until so proved, the presumption shall be that he is not so authorized."

We held that this statute did not create an unconstitutional presumption, because it did not shift to the defendant the burden of proof on an element of the crime. Id. at 409.



a criminal trial. The particular burden to which the quoted passage from Jones pertains is not the burden of proof, but merely the burden of coming forward with evidence sufficient to raise an issue of fact. See P.J. Liacos, Massachusetts Evidence 37 (5th ed. 1981 & Supp. 1985). Where the defendant at trial has had every opportunity to respond to the Commonwealth's charge that the defendant was unlawfully carrying a handgun, where the defendant need only produce that slip of paper indicating that he was licensed to carry that gun, and where instead the defendant produces no evidence to that effect, the jury are entitled to presume that the defendant indeed did not have a license to carry the gun, and the Commonwealth need present no additional evidence to prove that point. This scenario is a far cry



from a defendant who, having merely been seen in public with a handgun, and without any opportunity to respond as to whether he has a license, is forced out of his vehicle at gunpoint and subjected to an invasive search. The Jones standard does not make an open target of every individual who is lawfully carrying a handgun.

We briefly add that, while the motion judge did not address this issue, the Commonwealth is incorrect in its claim that the stop and subsequent search of the vehicle was justified under the principles of Terry v. Ohio, 392 U.S. 1 (1968). There is no question that the stop of the pickup truck constituted a seizure within the meaning of the Fourth Amendment to the United States Constitution. See United States v. Cortez, 449 U.S. 411, 417 (1981);

United States v. Brignoni-Ponce, 422

U.S. 873, 878 (1975). "An investigatory stop must be justified by some objective manifestation tht the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, supra. As we discussed above, there is absolutely no indication that the defendant in this case was engaged in criminal activity. The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles.

The order of the motion judge is affirmed.

So ordered.

NOLAN, J. (dissenting). It is a crime to carry on one's person or under one's control in a vehicle a firearm without a license. G.L. c. 269, §10(a) (1988 ed.). Such a weapon is contraband and, therefore, subject to seizure. See Commonwealth v. Ortiz, 376 Mass. 349, 354 (1978).

The police officer received a report that the defendant was carrying a firearm and that he was operating a pickup truck. Apparently, when the defendant was searched outside his truck, he did not have a firearm on his person. Was there not, then, probable cause to believe that such weapon was in the defendant's truck? Clearly, the officer had a right to stop the defendant, order him out of the truck, and to "pat-frisk" him. Not finding the weapon on his person, it was not

unreasonable to search the truck. Even Commonwealth v. Toole, 389 Mass. 159 (1983), on which the court relies entirely, recognizes the propriety of a search of a vehicle for contraband. Id. at 164.

This is just another regrettable extension of the already regrettable exclusionary rule. I enthusiastically dissent.

APPENDIX B

SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH  
ROOM 1412 COURT HOUSE  
BOSTON, MASSACHUSETTS 02108  
(617) 725-8055  
JEAN M. KENNETT FREDERICK J. QUINLAN  
Clerk Assistant Clerk

May 3, 1990

Michael Fabbri, A.D.A.  
Cheryl A. Jacques, A.D.A.  
James W. Sahakian, A.D.A.  
MIDDLESEX COUNTY D.A.'s OFFICE  
40 Thorndike Street  
East Cambridge, MA 02141

Re: COMMONWEALTH vs. PAUL R.  
COUTURE Supreme Judicial Court  
No. SJC-5088

Dear Mr. Fabbri:

Your Petition for Rehearing in the  
above captioned appeal has been  
considered by the court and is denied.

Very truly yours,

Dolores G. Dupre  
for Jean M. Kennett, Clerk

cc: Sheila Feiss, A.D.A.  
41 Hurd Street  
Lowell, MA 01852

P. Scott Bratton, Esq.  
ANDREW J. ZAROULIS LAW OFFICES  
9 Middlesex Street  
Lowell, MA 01852

Newman Flanagan, D.A.  
David B. Mark, A.D.A.  
David Mark, Chief Appellate A.D.A.  
SUFFOLK COUNTY D.A.'s OFFICE  
Pemberton Square  
Court House - 6th Floor  
Boston, MA 02108

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT  
DEPARTMENT  
LOWELL DIVISION  
JURY OF SIX SESSION  
NO. 8811- J.C. 0401

COMMONWEALTH

vs.

PAUL R. COUTURE

FINDINGS AND RULINGS ON DEFENDANT'S  
MOTION TO SUPPRESS

On February 11, 1988 a clerk at the Li'l Peach store phoned the Lowell Police department and informed them that a man inside the store had a small handgun protruding from his right rear pocket. The man entered a gray pick-up truck with a New Hampshire registration, which the clerk gave to the police.

Later a national park ranger radioed that he was behind a truck fitting the description and bearing the registration number given by the clerk of the store. Officer Gary Richardson of the Lowell

Police department heard the transmission and stopped the vehicle.

Officer Richardson then went to the vehicle and searched and found a small 38 caliber pistol. The firearm was not in plain view. It was three or four inches under the front seat, near the transmission. The officer testified he was not in fear of his safety at the time of the search.

The officer then advised the defendant of his rights. He then asked the defendant if he had a license. The defendant replied that he didn't.

I rule the defendant's motion to suppress the firearm is allowed applying the reasoning of Comm. v. Toole, 389 Mass. 159 (1983).

Dated: Aug. 16, 1988

By the Court,

/s/

---

Neil Colicchio, Justice



APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.      LOWELL DISTRICT COURT  
JURY OF SIX SESSION  
NO. 8811-JC 0401

COMMONWEALTH

v.

PAUL R. COUTURE

---

TRANSCRIPT OF MOTION TO DISMISS  
AND MOTION TO SUPPRESS

---

Christine Bannon, Assistant District  
Attorney for the Commonwealth

P. Scott Bratton, Esquire  
For the Defendant

Before: Colicchio, J.  
Lowell District Court  
July 11, 1988

DEF: Your honor I filed two motions in this case, both to be heard today. One is a Motion to Dismiss for loss of exculpatory evidence and the other is a Motion to Suppress, to suppress the weapon which was seized.

Court: This is on Couture.

DEF: That's right. For each of these motions I filed the motion with an Affidavit and Memorandum which the court has.

Court: Alright counsel.

DEF: Your honor, If I could be heard first on my motion to dismiss.

Court: Alright.

[ARGUMENT ON MOTION TO DISMISS OMITTED]

Court: What is the Motion to Suppress based on?

DEF: Your honor that motion is based on what I consider to have been an illegal seizure of a motor

vehicle and then a subsequent illegal search of the interior of the cab which yielded the gun. That's an entirely separate motion.

Court: I assume it is a separate motion, I just wanted to know what the basis was. I haven't read the whole thing your not raising the issue about the license not having a license.

DEF: No your honor my issue on the Motion to Suppress is that there was neither probable cause or reasonable suspicion of a crime to justify stopping the truck and that any following search was illegal.

Court: You're citing the Toole case.

DEF: Yes your honor. The way the license aspect comes into...if

I may... with respect to the Toole case, I believe this is a case that is nearly identical actually to my case. I'm sure the court is familiar with the Toole case. In this case there was also an issue of whether the defendant possessed the gun, possessed a license to carry. In this case....

Court: Since I'm going to give you a new date. I haven't read the thing thoroughly. Is it the Commonwealth's allegation that they ask the defendant whether or not he had a license or permit to carry before.

DEF: No. That did not happen until afterwards.

Court: Alright, you can have a new date.

D.A.: To hear both motions?

Court: Both of them, there's no sense in hearing one, we'll hear them both together.

DEF: Is it possible to have the Motion to Suppress...we have the officer hear he's been waiting.

Court: Alright.

D.A.: Commonwealth calls Gary Richardson. Would you please state your name and spell your last name for the record.

WIT: Gary Richardson.  
R-i-c-h-a-r-d-s-o-n.

D.A.: Are you employed?

WIT: - Yes, I am.

D.A.: Where are you employed?

WIT: By the Lowell Police Department.

D.A.: How long have you been so employed?

WIT: Nine (9) years.

D.A.: Were you on duty on February  
11, 1988?

WIT: Yes I was.

D.A.: What duty were you assigned to?

WIT: I was assigned from the 5:00  
P.M. to the 1:00 A.M. shift,  
car #3 Belvidere section of  
Lowell.

D.A.: Were you working alone or with  
another officer?

WIT: I was with another officer.

D.A.: Who was that officer?

WIT: Officer Steven Morrill.

D.A.: At approximately 11:35 P.M. on  
February 11th did something  
happen that attracted your  
attention?

WIT: Yes.

D.A.: What happened?

WIT: I received a radio transmission from the communication center of the police station.

D.A.: Would you please relate to the court the subject matter of that radio communication.

WIT: The radio transmission stated that that there was a call from the Lil' Peach Store on Rogers Street from the clerk who stated that there was a man inside his store with a small handgun in his right rear pocket with a white pistol grip.

D.A.: And did you receive any other information in the radio communication?

WIT: Not at that particular time.

D.A.: Did you receive any information regarding a description of the vehicle?

WIT: Yes. Shortly thereafter I received information that the gentlemen had left in a green or grey Dodge Pickup truck with a New Hampshire registration.

D.A.: Did you receive any other information in this second communication?

WIT: Only that the direction of the truck had left in and the registration number, at that time.

D.A.: After you received this radio communication, what if anything did you do?

WIT: I headed towards the area of the Lil' Peach Store.

D.A.: And did something happen later regarding this radio communication?

WIT: Yes.



D.A.: What happened?

WIT: We received a radio communication from a National Park Ranger who stated that he was behind the motor vehicle that was described leaving the store.

D.A.: And was the license plate number on this motor vehicle the same as the one you had received in your earlier transmission as having left the Lil' Peach, with the man with the gun?

WIT: Yes, it was.

D.A.: As a result of the radio communication from the Park Ranger, what if anything did you do?

WIT: At that point we headed towards the Hunt Falls Bridge where the

Park Ranger had spotted the motor vehicle. As a result of that we pursued the motor vehicle to Reed Street, Centerville Section of Lowell, where we pulled it over.

D.A.: Did you activate your blue lights in this pursuit?

WIT: Yes, we did.

D.A.: Where did you pull the vehicle over?

WIT: On Reed Street.

D.A.: And who was present at the scene when you pulled the vehicle over?

WIT: Myself, the Park Ranger and Sgt. Deward who was in another patrol car.

D.A.: And after you arrived at the scene, what if anything did you do?

WIT: We approached the vehicle and took the operator of the motor vehicle from the motor vehicle.

D.A.: How many people were there in the motor vehicle at the time you stopped it?

WIT: One (1).

D.A.: And is the person that was in the motor vehicle in the courtroom today?

WIT: Yes he is.

D.A.: Would you please point to that person and describe what he is wearing for the record.

WIT: The gentleman right here with the red hair in the three piece blue suit.

D.A.: Your honor may the record reflect that he has identified the defendant, Paul Couture.

D.A.: When you approached the vehicle, what exactly happened?

WIT: When I approached the motor vehicle, I went to the driver's side door, with my service revolver out and I ordered the defendant from the motor vehicle.

D.A.: And what if anything did you do next?

WIT: At that point we took him right to the back where the cab, or rear of the truck is.

D.A.: And did you at that time have any conversation with the defendant?

WIT: Not at that point. I just asked him for some identification, that was the extent of it.

D.A.: And what did you do next?

WIT: At that point I have Officer Morril detain the defendant at the rear of the truck and we checked the passenger area of the cab of the pickup truck.

D.A.: And in your check of the passenger's area of the pickup truck, did you find anything?

WIT: Yes we did.

D.A.: What did you find?

WIT: We found a small 38 caliber Derringer with a white pistol grip, as described by the clerk at the store as being in the motor, as being in the man's possession.

Court: Where did you find it Officer?

WIT: It was on the floor on that, like the hump where the transmission goes your honor,

just about three of four inches under the seat.

D.A.: And did the gun that you found match the description that you heard from the radio communication as being the gun that was in the Lil' Peach Store earlier?

WIT: Yes it did.

D.A.: After you discovered the hand gun what if anything did you do?

WIT: At that time, I examined the gun to check to see if it was loaded. I removed the rounds from it at that time and then I went and spoke with the defendant.

D.A.: And what conversation, if any, did you have, with the defendant?

WIT: I advised him of his rights,  
per miranda, and at that time I  
asked him if he had a license  
to carry a handgun.

D.A.: And did he respond to that  
question?

WIT: Yes he did.

D.A.: What was his response?

WIT: He said he had no license to  
carry a handgun.

D.A.: Based on that information, what  
if anything did you do?

WIT: The defendant was placed under  
arrest and transported to the  
station via wagon, the handgun  
was tagged as evidence and sent  
to 1010 Commonwealth Avenue for  
a ballistics check.

D.A.: Was possession of a firearm the  
only count Mr. Couture was  
charged with at that time?

WIT: That's correct.

D.A.: May I have one moment your honor? Did you bring the gun with you today?

WIT: No I didn't.

D.A.: Your honor, it should have been a preliminary matter, but defense counsel and I have stipulated that for purposes of this motion, that the gun in question was a fire arm under Chapter 140 Section 121. The gun is not available today.

DEF: That's correct your honor.

D.A.: Officer Richardson when you found the handgun, would you please describe exactly where it was in relation to whether it was more towards the passenger's side or the driver's side of the front cab?



WIT: It was more towards the driver's side, I would say that it was on the side of the hump, as I said it allows the drive shaft transmission to go to the engine, probably like 3 inches down the side of the hump.

D.A.: It was more towards the driver's side then the passenger's side, is that your testimony?

WIT: Yes it was.

D.A.: No further questions.

Cross-examination of Officer  
Richardson by Defendant

DEF: A few brief questions your honor. Now officer when you received the radio transmission, were you the

first officer responding to the  
Lil' Peach Store?

WIT: I never responded to the  
store. Another cruiser went  
and gave us the further  
information.

DEF: Is it fair to say that neither  
men committed a crime at the  
Lil' Peach?

D.A.: Objection.

Court: No.

DEF: Is it fair to say that neither  
men committed a crime at Lil'  
Peach?

WIT: I wasn't at Lil' Peach.

DEF: Based on the information you  
had, is it fair to say you were  
not investigation a shoplifting  
case?

WIT: That's correct.

DEF: Then is it fair to say that you  
were not investigation an

attempted robbery case?

WIT: At that point in time we didn't have that information as far as a robbery.

DEF: But it's fair to say that the only thing which my client was charged with was possession of the gun, correct?

WIT: That's correct?

DEF: And why were you trying to pull him over that night?

WIT: Based on the information that we received from the radio.

DEF: Which was that?

WIT: That a man had left the store with a gun, they gave a description of the truck and the plate.

DEF: Now if one possesses a handgun with a license it is not

illegal to possess a handgun,  
correct?

WIT: That's correct.

DEF: And until you asked my client  
after the search, you had no  
knowledge that he did not  
possess a license, to carry.

WIT: That's correct.

DEF: So is it fair to say that prior  
to pulling the truck over you  
had no evidence that he had  
committed any crime?

WIT: No I didn't.

DEF: Now the truck was not pulled  
over for any motor vehicle  
violations, is that correct?

WIT: That's correct.

DEF: So you pulled him over because  
you suspected that neither man  
had a license to carry, is that  
fair to say?

WIT: No that's not.

DEF: Why then was he pulled over?

WIT: As a result of the radio transmission, a man was in a store with a gun in his back pocket, I felt that there may have been a crime committed.

DEF: But from the information you had, in fact there was no crime committed, is that right?

WIT: At that point in time.

DEF: Now when you searched the truck, the gun was found three or four inches under the front seat?

WIT: That's correct.

DEF: And when you were searching the truck, my client was at the rear of the truck.

WIT: That's correct, about half way down the side.

DEF: Okay. And you were with  
Officer Morril and Officer  
Duarte.

WIT: That's correct.

DEF: And when you were searching the  
truck, do you know if he was  
handcuffed yet?

WIT: No, he wasn't.

DEF: Do you know if the other  
officers had their service  
revolvers drawn on him?

WIT: Not at that point, no.

DEF: Did you fear that he might try  
to escape?

WIT: No.

DEF: I have no further questions...I  
have just one more question?

DEF: Did you fear for your safety  
while you were searching the  
cab of the truck?

WIT: No.

DEF: No further questions.

D.A.: I just have a couple of quick questions. Officer the location that you found the gun in, was that an area that the defendant would have access to...

DEF: Objection.

Court: She hasn't finished her question.

D.A.: Would that be an area in which the defendant in operating the vehicle would have access to as the driver of the vehicle?

WIT: Absolutely.

DEF: Objection, motion to strike.

Court: No.

D.A.: No further questions your honor.

DEF: Nothing further your honor.

D.A.: That's the Commonwealth's case your honor.

DEF: May I be heard in arguments  
your honor?

Court: I'll take, before we hear  
arguments, Madame D.A., do you  
feel that Toole case has to be  
distinguished here.

D.A.: Excuse me, the Toole case?

Court: Are you familiar with it?

D.A.: Yes I am your honor. I feel it  
is distinguished because the  
reason that this particular  
defendant was stopped was  
because of the firearm, the  
police had reasonable belief  
when they stopped the vehicle  
to believe that the defendant  
was possessing a firearm.

Court: What did Toole talk about.

D.A.: That talks about a person being  
stopped and that they felt that  
the firearm could be on it.



Court: What are they talking about legally speaking, never mind factually speaking. What are they saying legally speaking? I'm going to do this, I'm going to give you an opportunity to file a Memorandum in response to the defendant's memo. I would suggest that you absolutely zero in on the Toole case and decide whether or not it has to be distinguished, and if it does have to be, inform the court how you distinguish it.

D.A.: Thank you your honor.

DEF: Your honor may I ask that on the second motion date, will I be able to make argument on the Motion to Dismiss in response

to the Commonwealth's  
Memorandum.

Court: Would you be able to argue the  
Motion to Dismiss?

DEF: Suppress.

Court: Of course, she's going to give  
us a Memo.

DEF: Alright. So there won't be any  
further argument on this.

Court: Well let's not say that we  
won't have an argument at the  
moment, I want the district  
attorney to determine if she  
feels the Toole case has to be  
distinguished and how she  
distinguishes it.

DEF: Okay, so am I correct in  
understanding that after the  
Memorandum is submitted you  
will decide the case without  
further argument.

Court: Oh no, no no. That's the day  
I'm going to listen to  
argument, you see I haven't  
heard argument yet on it.

DEF: Oh I see.

Court: I want her to look over it and  
see whether or not it has to be  
distinguished and if she says  
yes and she says this is how it  
is, then I will expect you to  
respond, orally.

DEF: Thank you your honor.